

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33177
Y/prt

_____AD3d_____

Argued - October 28, 2011

WILLIAM F. MASTRO, A.P.J.
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-07198
2011-02308

DECISION & ORDER

Jasmine Rivera, respondent, v City of New York,
appellant, et al., defendant (and a third-party action).

(Index No. 26603/08)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Stephen J. McGrath and Michael Shender of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Brian J. Shoot and Marie Ng of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant City of New York appeals (1) from an order of the Supreme Court, Kings County (Velasquez, J.), dated June 16, 2010, which denied its motion pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross claims insofar as asserted against it or, in the alternative, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and (2), as limited by its brief, from so much an order of the same court dated December 7, 2010, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order dated June 16, 2010, is dismissed, as that order was superseded by the order dated December 7, 2010, made upon reargument; and it is further,

ORDERED that the order dated December 7, 2010, is reversed insofar as appealed from, on the law, and, upon reargument, so much of the order dated June 16, 2010, as denied that branch of the motion of the defendant City of New York which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is vacated and thereupon, that branch of the motion is granted; and it is further,

December 13, 2011

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ORDERED that one bill of costs is awarded to the defendant City of New York.

On March 19, 2008, the plaintiff, a frequent guest of a friend living in an apartment building in the Van Dyke housing project in Brooklyn, was accosted by a man in the elevator of a building therein and then raped on the stairway landing leading to the roof. The plaintiff commenced this action against the New York City Housing Authority (hereinafter the NYCHA) and the City of New York alleging that, as the owner or operator of the building, each was negligent in failing to adequately secure the building. The plaintiff alleged numerous specific acts of negligence, including, among other things, the failure to secure a back door, maintain an operable intercom system, and maintain an adequate video surveillance and camera monitoring system.

Before the completion of discovery, the City moved pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross claims insofar as asserted against it or, in the alternative, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The Supreme Court denied the motion, without prejudice to renewal after discovery was complete. The City then moved for leave to reargue its motion. The Supreme Court granted leave to reargue but, upon reargument, adhered to its determination.

The Supreme Court should have granted that branch of the City's motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The City established its prima facie entitlement to judgment as a matter of law by submitting proof that it did not own or otherwise control the premises where the crime occurred. Indeed, the record demonstrates that the subject property was owned by the NYCHA, not the City. Moreover, the extent that the plaintiff alleges specific acts of negligence against the City that implicate its governmental function of providing police protection, the City is immune from these claims (*see Price v New York City Hous. Auth.*, 92 NY2d 553, 557-558; *Miller v State of New York*, 62 NY2d 506, 512-513; *see generally Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428). In opposition, the plaintiff failed to raise a triable issue of fact. Nor is there a basis to suggest that further discovery may lead to relevant evidence sufficient to oppose the motion (*see CPLR 3212[f]; Brennan v Gagliano*, 71 AD3d 620; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736).

The plaintiff's request for the imposition of a penalty pursuant to CPLR 3126 is improperly made for the first time on appeal.

In light of our determination, it is unnecessary to reach the City's remaining contentions.

MASTRO, A.P.J. CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court